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Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY

Petitioner

against

MARTIN L. SWEENEY

PETITIONER'S REPLY BRIEF

Supreme Court of the United States

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No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY,
Petitioner,

against

MARTIN L. SWEENEY.

PETITIONER'S REPLY BRIEF

I

Respondent's brief is pervaded by an error which vitiates his position on a basic issue.

He seeks to distinguish cases establishing the New York public official rule on the sole alleged ground that they involved merely "genuine criticism *based upon facts indisputably true*" (Res. Br. 15), or, as he says in another place, "genuine criticism based upon *official acts uncontrovertibly true*" (Res. Br. 4).

No such distinction is possible. In those cases, as in the case at bar, (a) the complaints alleged that the publications containing assertions of fact were false,* (b) motions

* *E. g., Tanzer* (240 App. Div. 203) Rec. on App., pp. 13, 15, 16; *Gardner* (237 App. Div. 200) Rec. on App., pp. 7, 8; *Hills* (214 App. Div. 752, *aff'g* 122 Misc. 212) Rec. on App., pp. 17, 18; *Duffy* (109 App. Div. 471) Rec. on App., pp. 6-7.

were made to dismiss the complaints as insufficient in law upon their face, * and (c) the courts necessarily had to assume upon such motions, and indicated that they were assuming, that the publications were false in their entirety. † The cases, therefore, definitely support the public official rule, which is to the effect that a publication concerning a public official, even if "without foundation in fact," is not libelous *per se* unless it comprises "a clear charge of corruption or gross incompetence" (*Tanzer* v. *Crowley Pub. Corp.*, 240 App. Div. 203, 205).

II

Since the filing of the petition an Ohio court of intermediate appeal has held, in *Sweeney* v. *The Scripps Publishing Co.*, that a publication falsely charging the Congressman with having said:

> "deliver us from the spirit of the worst government in the world—the spirit of Poland"

is not libelous *per se*, as against the claim that it imputed anti-Polish prejudice to respondent (Court of Appeals, 8th Dist., December 1, 1941, memo.). This holding is in line with Ohio's previous disposition of respondent's suit based on the "Merry-Go-Round" column (Pet. 7).

We cite this development as showing, by implication from respondent's own behavior, the scope and inherent dangers of the decision of the Circuit Court of Appeals under review. An "anti-Polish" case is the logical sequel to an "anti-Jewish" case. The rationale of the decision

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* In *Tanzer*, *Gardner* and *Duffy* motions were made to dismiss the complaints; in *Hills* the motion was for judgment on the pleadings dismissing the complaint, which has the same effect.

† See 240 App. Div. at 205; 237 App. Div. at 201; 122 Misc. at 215; 109 App. Div. at 474.

below will in practice, as Judge CLARK foresaw, cover an enormous area of expression concerning the acts and attitudes of public officials. Again we earnestly submit that the question is one of great public importance and worthy of review (Pet. 27-29).

Respectfully submitted,

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